

1 Leah R. Wigren
2 Nevada Bar Number 6862
3 5995 Shadow Park Drive
4 Reno, NV 89523
5 775-747-0526
6 Attorney for Del Hardy

7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA

9 United States of America,
10 Plaintiff,

11 vs.

12 Delmar Hardy,
13 Defendant.

03:16-cr-6-MMD-VPC

Motion for Bill of Particulars

14 Certification: This Motion is filed timely.

15 Pursuant to Federal Rules of Criminal Procedure 7 and 47, and LCR 47-1,
16 Del Hardy, by and through counsel, Leah Wigren, moves the Court for a Bill of
17 Particulars addressing the charges alleged in the Indictment filed in this case on
18 January 27, 2016. This Motion is supported by the following Points and
19 Authorities.
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23 Dated this 14th day of November, 2016

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25 By: Leah R. Wigren /s/
26 Leah R. Wigren
27 Counsel for Del Hardy
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 27, 2016, a District of Nevada Grand Jury charged Del Hardy by way of Indictment with One Count of Conspiracy, in violation of 18 U.S.C. § 371, three counts of False Tax Returns, in violation of 26 U.S.C. § 7206(1), one count of Corruptly Obstructing or Impeding Due Administration of the Internal Revenue Laws, under 26 U.S.C. § 7212(a), and four counts of aiding and abetting, 18 U.S.C. § 2. See generally, Indictment, Dkt. No. 1.

In the ensuing months the Government issued nearly 87,000 pages of discovery. Despite this disclosure, the nexus between the charges in the Indictment is unclear. The prosecution appears akin to a tale of two cases. The tax counts do not seem to cross-over to the conspiracy to structure financial transactions, or the obstructing IRS administration claim. Hence, this request that the Government produce additional details supporting its prosecution so the defense effectively prepare its case.

II. LEGAL ANALYSIS

A. Definitions and Laws Governing a Bill of Particulars:

A bill of particulars is a detailed, formal, written statement of charges or claims by a plaintiff or the prosecutor given upon the defendant's formal request to

1 the court for more detailed information. BARRON'S LAW DICTIONARY 47 (2nd Ed.
2 1984).

3 A Motion for Bill of Particulars is governed by Federal Rule of Procedure
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5 7(f) which states:

6 A defendant may move for a bill of particulars before or within fourteen
7 days after arraignment, or at a later time if the court permits.

8 The rule allows the Court to require the Government to issue a bill of
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10 particulars at any time in the case. Counsel did not move for a bill of particulars
11 earlier, to avoid burdening the Court and Government with needless motions, until
12 counsel was relatively confident that all discovery had been disclosed, and had the
13 time to work through it. The Government issued an additional 40,000 pages of
14 discovery in June, 2016, and approximately 800 more on November 14, some in
15 response to defense discovery requests. Counsel is not criticizing this, as the
16 document load is large and discovery disclosures take time. However, a motion for
17 bill of particulars could not reasonably have been made within fourteen days of the
18 Indictment, as the defense did not possess even close to all of the discovery at that
19 time, and still may not, given past experience with the way the Internal Revenue
20 Service handles its evidence disclosures. Further, the discovery does not clear-up
21 fundamental issues in the case that directly bear on Mr. Hardy's right to effectively
22 and efficiently prepare a defense for trial. The time for a bill of particulars has
23 arrived.

1 The standards governing a request for a bill of particulars are well-settled
2 and based on case law that is decades old. A Motion for Bill of Particulars is
3 appropriate where the accused requires clarification in order to prepare a defense.
4
5 Will v. United States, 389 U.S. 90, 99 (1967). A bill of particulars is designed to
6 apprise the defendant of specific charges being presented to minimize the danger
7 of surprise at trial, to aid in preparing a defense, and protect against double
8 jeopardy. Clayton v. United States, 441 U.S. 962 (1979). When deciding a motion
9 requesting a bill of particulars, the Court typically asks whether the defendant has
10 been adequately advised of the charges, through the indictment, and all discovery
11 the Government issued.
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15 B. Basis for Mr. Hardy's Request for Bill of Particulars:

16 1. Tax Counts:
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18 While the defense being in possession of discovery is an element counseling
19 against a bill of particulars, a compelling reason supporting this Motion is the
20 voluminous discovery, and the uncertainty of what items comprising it the
21 Government will use in its attempt to prove the charges against Mr. Hardy.
22 Counsel acknowledges the defense does not have the right to know exactly what
23 evidence the Government intends to use, and how it will be employed. United
24 States v. Yeargain, 314 F.2d 881, 882 (9th Cir. 1963). However, the
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26 countervailing proposition is that one of the rationales of a bill of particulars is to
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aid in defense preparation. Clayton, 441 U.S. at 968. The function of a bill of particulars is to “inform the defense of the specific occurrences intended to be investigated on the trial and to *limit the course of the evidence to the particular scope of the inquiry.*” BARRON’S, at 47 (emphasis added). With 87,000 documents, it is an enormous task to sift through the discovery and guess at what evidence the Government will use in an attempt to prove the charges. A bill of particulars will limit the course of the evidence to the particular scope of the Government’s inquiry.

Three of the charges against Mr. Hardy are for filing a false tax claim. As part of those charges, the language of the Indictment indicates Mr. Hardy is accused of evading taxes due to the United States Treasury. See Indictment at 4-7. In tax evasion cases, the Government may use one of several methods of proof. Each method requires proof of certain facts, and if the defendant is not aware of which method the Government intends to use, of necessity he or she must prepare a defense appropriate to each method of proof. This leads to wasted time and enormous expense. United States v. Goldstein, 56 F.R.D. 52, 55 (D. Del. 1972). The Goldstein defendants, like Mr. Hardy, were charged with filing a false tax claim by not reporting income. Id. at 56. There, the court held that if the Government was relying on a theory of omission, it must identify the omissions with specificity. Id. Counsel for Mr. Hardy requests the same treatment. If the

1 Government is alleging that Mr. Hardy omitted certain information or income from
2 this tax returns at issue, it should set forth those omissions with specificity. This
3 will aid in trial preparation, and avoid surprise at trial.
4

5 Under the specific items method, the Government ... produce[s] evidence of
6 the receipt of specific items of reportable income by the defendant that do not
7 appear on an income tax return, or appear in a diminished amount. United States
8 v. Thompson, 518 F.3d 832, 853 (10th Cir. 2008); see also, United States v.
9 Genser, 582 F.2d 292, 295 n.1 (3d Cir. 1978) (noting that under specific items
10 method of proof "it is sufficient to show that contrary to usual practices a
11 defendant received certain payments in cash which were not in turn reported on
12 income tax returns."). The specific items method of proof is a direct method of
13 demonstrating tax evasion.
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18 Additionally, the Government could decide to prosecute this case by using a
19 circumstantial method of proof, employing either the net-worth cash expenditures,
20 or bank deposits methods. See United States v. Manfredi, 628 F.Supp2d 608, 635-
21 38 (W.D. Pa. 2009). In that case, the court found:
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23 Under the net worth method, the government attempts to establish by
24 circumstantial proof the existence of unreported income by selecting an
25 opening year for which it can reasonably ascertain the defendant's net worth
26 and comparing that amount with a closing year's net worth. Any estimated
27 nondeductible living expenses during that period are added to the
28 closing net worth. The opening net worth is subtracted from the closing net
worth to gauge the amount of unreported income the defendant must have
had. But the government's burden does not rest there, it must then either

1 prove that there is a likely source of the unreported income, or negate all
2 possible nontaxable sources of that income.

3 Id. at 650, n.20. If the Government intends to employ this method of proof,
4 counsel requests that the Court require it to proffer what it contends Mr. Hardy's
5 net worth was at the beginning and end of each tax year charged.
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7 The expenditure theory holds that if, during a given period, the taxpayer's
8 expenditures exceeded the amount of reported income, and net worth at the end of
9 the period is at least the same as it was at the beginning, then it may be concluded
10 that the income tax return shows less income than what was received. Id. at 650,
11 n.21.
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14 The bank deposits method attempts to demonstrate unreported income
15 through an analysis of the taxpayer's bank deposits, and is used when the taxpayer's
16 financial records are incomplete or do not accurately reflect income. This method
17 of accounting relies heavily on circumstantial evidence; therefore, the government
18 must be thorough in its development and presentation of the evidence used to
19 demonstrate the presence of unreported income. Id.; n.21
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23 In Manfredi, after the defendant filed a Motion for Bill of Particulars, the
24 Government proffered what method it intended to use to prove the tax claims
25 against the defendant. In Mr. Hardy's case, knowledge of the method the
26 Government intends to use in an attempt to prove its case will aid in defense
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1 preparation by facilitating application and analysis of specific discovery documents
2 to the elements of the charges. 628 F.Supp2d at 637-38. Additionally, Manfredi
3 supports the proposition that the Government proffer details to the Court and
4 defense about how it intends to present its evidence, i.e., in summary form or
5 otherwise, and what evidence it intends to apply to what indicted counts. Id. This
6 is a fair request given the copious documents characterizing Mr. Hardy's case.
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9 Further precedent supports the Court ordering the Government to specify
10 which method it intends to use to prove false tax claim allegations at trial by way
11 of a bill of particulars. See United States v. Bailey, 689 F. Supp. 1463, (N.D. Ill.
12 1987). In that tax case, the court found that without the method information, “the
13 defendants will waste their valuable time and money preparing a defense to a
14 number of different methods of proof available to the government.” Id. at 1474.
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18 2. Conspiracy to Structure Financial Transactions Count:

19 Mr. Hardy requests a bill of particulars for this charge, setting forth the
20 illegal activity alleged against him, given the Indictment appears to allege conduct
21 that is not illegal, as set forth in Mr. Hardy's Motion to Dismiss.
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24 Moreover, the allegations in paragraph nine of the Indictment state, “It was
25 further a part of the scheme and artifice that **HARDY** made such other false,
26 fraudulent, deceptive, and deceitful representations as necessary to advance the
27 fraudulent scheme, conceal his fraudulent activities from others, avoid detection,
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1 enrich himself, and cause loss to others.” These vague and broad allegations with
2 no time period, place, or victim alleged, require a bill of particulars to assist in
3 defense preparation and ascertainment of which discovery supports them.
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5 CONCLUSION

6 Counsel for Mr. Hardy relies on the foregoing to respectfully request that the
7 Court require the Government to issue a bill of particulars detailing:
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9 1. What method of proof regarding the tax claims it intends to employ
10 during trial;
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12 2. What evidence it intends to offer, in the interest of limiting the
13 evidence to the particular charges;
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15 3. The specific entries or parts of tax returns and schedules for relevant
16 years that are allegedly false;
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18 4. The date, amount, character, and source of income the defendant
19 allegedly received but did not report;
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21 5. In what form it intends to present its evidence, i.e., summary, charts,
22 graphs, etc.; and,
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24 6. What conduct by Mr. Hardy justifies the allegations set forth in
25 paragraph nine of the Indictment, and in Count One.
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Respectfully submitted this 14th day of November, 2016

By: Leah R. Wigren /s/
Leah R. Wigren
Counsel for Del Hardy

CERTIFICATE OF SERVICE

The undersigned certifies that on November 14, 2016, she electronically filed with the District of Nevada this Motion for Bill of Particulars, and that Plaintiff's counsel, James Keller, at James.Keller3@usdoj.gov, is listed in the District of Nevada's electronic case management system as a recipient of all electronic filings in Case Number 3:16-cr-6-MMD-VPC, at the electronic mailing address provided here.

Leah R. Wigren /s/
Leah R. Wigren
Counsel for Del Hardy